

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:01CR3085
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM
)	AND ORDER
CESAR GONZALEZ, a/k/a)	
CEASAR GONZALEZ,)	
)	
Defendant.)	

Defendant, a federal prisoner, previously filed a motion to vacate conviction, which I treated as a motion under 28 U.S.C. § 2255 and denied on initial review. (Filing 152, entered on February 23, 2005). Defendant has now filed an “Emergency Motion for the Issuance of Certificate of Appealability or Correct the Sentence.” (Filing 154.) I will treat the motion as a notice of appeal and request for a certificate of appealability.

A notice of appeal of a judgment denying a § 2255 motion must be filed within 60 days after the judgment. FRAP 4(a)(1)(B). A district court may extend the time for filing a notice of appeal if the party appealing requests an extension no more than 30 days after the FRAP 4(a)(1)(B) time for filing, or upon a showing of excusable neglect or good cause. FRAP 5. As the judgment denying the § 2255 motion was entered on February 23, 2005, it is more than 30 days past the FRAP 4(a)(1)(B) deadline for filing a notice of appeal. There has been no showing of good cause or excusable neglect. Thus, considering the motion in filing 154 as a notice of appeal, it is untimely.

The motion also seeks a certificate of appealability. Before Defendant can appeal this court’s decision denying his § 2255 motion, a certificate of appealability

must issue. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may issue under 28 U.S.C. §2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 petition, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong” in order to meet the standard contained in § 2253(c). Slack v. McDaniel, 120 S. Ct. 1595, 1604 (2000). In contrast, when a district court denies a § 2255 petition on procedural grounds without reaching the applicant’s underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when “the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Slack, 120 S.Ct. at 1604.

The court must either issue a certificate of appealability indicating which issues satisfy the required showing, or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b). For the reasons set forth in this court’s memorandum and order denying the § 2255 motion (filing 152), Defendant has not made a substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c).

Accordingly,

IT IS ORDERED:

1. Construing the motion in filing 154 as a notice of appeal and request for a certificate of appealability, the notice of appeal is untimely and there has been no showing of excusable neglect or good cause and a certificate of appealability is denied and shall not issue; and

2. The Clerk of the United States District Court for the District of Nebraska shall provide a copy of this order to the Eighth Circuit Court of Appeals.

DATED this 10th day of June, 2005.

BY THE COURT:

s/Richard G. Kopf
United States District Judge